IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35749

JOHNNY MARTINEZ, JR.,	)	**2010 Unpublished Opinion No. 322**
	)	
Petitioner-Appellant,	)	**Filed: January 26, 2010**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
STATE OF IDAHO,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Respondent.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Third Judicial District, State of Idaho, Canyon County. Hon. Gregory M. Culet, District Judge.

Order of the district court summarily dismissing application for post-conviction relief, affirmed.

Molly J. Huskey, State Appellate Public Defender; Eric D. Fredericksen, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent.

GRATTON, Judge

Johnny Martinez, Jr., appeals from the district court's order summarily dismissing his application for post-conviction relief. We affirm.

I.

FACTS AND PROCEDURAL BACKGROUND

Martinez was found guilty by a jury of possession of methamphetamine with intent to deliver, Idaho Code § 37-2732(a)(1)(A), two counts of trafficking in methamphetamine, I.C. § 37-2732B(a)(4), and trafficking in marijuana, I.C. § 37-2732B(a)(1), but acquitted on a charge of delivery of methamphetamine, I.C. § 37-2732(a)(1)(A). This Court affirmed Martinez's conviction and sentences. *State v. Martinez*, Docket No. 30573 (Ct. App. December 21, 2005) (unpublished).

Martinez filed an application for post-conviction relief raising approximately 33 claims. The district court conducted a hearing on the State's motion for summary disposition and,

thereafter, entered an order granting the State's motion and summarily dismissing the application. Martinez appeals.

II.
ANALYSIS

In this appeal, Martinez contends that the district court should have granted an evidentiary hearing on a single claim of ineffective assistance of counsel. As explained more fully below, during trial the investigating officer, responding to a question from defense counsel, commented that he had heard that defense counsel was a drug user. On the last day of trial, a juror submitted a note to the court indicating she had heard another juror comment that his sister told him that, indeed, defense counsel was known to be a drug user. The State and defense counsel stipulated that the prosecutor would advise the jury that there was no evidence defense counsel was a drug user and that the offending juror would be deemed the alternate. Martinez claims defense counsel was ineffective in failing to move for a mistrial on the ground that the jury was contaminated rather than agreeing to the mentioned stipulation.

An application for post-conviction relief initiates a civil, rather than criminal, proceeding, governed by the Idaho Rules of Civil Procedure. *State v. Yakovac*, 145 Idaho 437, 443, 180 P.3d 476, 482 (2008); *see also Pizzuto v. State*, 146 Idaho 720, 724, 202 P.3d 642, 646 (2008). Like the plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Stuart v. State*, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990); *Goodwin v. State*, 138 Idaho 269, 271, 61 P.3d 626, 628 (Ct. App. 2002). "An application for post-conviction relief differs from a complaint in an ordinary civil action[.]" *Dunlap v. State*, 141 Idaho 50, 56, 106 P.3d 376, 382 (2004) (quoting *Goodwin*, 138 Idaho at 271, 61 P.3d at 628)). The application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). *State v. Payne*, 146 Idaho 548, 560, 199 P.3d 123, 135 (2008); *Goodwin*, 138 Idaho at 271, 61 P.3d at 628. The application must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application is the procedural equivalent of summary judgment under I.R.C.P. 56. "A claim for post-conviction relief will be subject to summary dismissal . . . if the applicant has not presented evidence making a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof." *DeRushé v. State*, 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009) (quoting *Berg v. State*, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998)). Thus, summary dismissal is permissible when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Payne*, 146 Idaho at 561, 199 P.3d at 136; *Goodwin*, 138 Idaho at 272, 61 P.3d at 629. Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the State does not controvert the applicant's evidence because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. *Payne*, 146 Idaho at 561, 199 P.3d at 136; *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994).

On review of dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of material fact exists based on the pleadings, depositions, and admissions together with any affidavits on file. *Rhoades v. State*, ___ Idaho___, 220 P.3d 1066 (Oct. 26, 2009); *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993). However, "while the underlying facts must be regarded as true, the petitioner's conclusions need not be so accepted." *Rhoades*, ___ Idaho at ___, 220 P.3d at 1069 (quoting *Phillips v. State*, 108 Idaho 405, 407, 700 P.2d 27, 29 (1985)); *see also Hayes v. State*, 146 Idaho 353, 355, 195 P.3d 712, 714 (Ct. App. 2008). As the trial court rather than a jury will be the trier of fact in the event of an evidentiary hearing, summary dismissal is appropriate where the evidentiary facts are not disputed, despite the possibility of conflicting inferences to be drawn from the facts, for the court alone will be responsible for resolving the conflict between those inferences. *Yakovac*, 145 Idaho at 444, 180 P.3d at 483; *Hayes*, 146 Idaho at 355, 195 P.3d at 714. That is, the judge in a post-conviction action is not constrained to draw inferences in favor

of the party opposing the motion for summary disposition but rather is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts.[1] *Id*.

A claim of ineffective assistance of counsel may properly be brought under the Uniform Post-Conviction Procedure Act. *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Aragon*, 114 Idaho at 761, 760 P.2d at 1177.

At trial, Martinez's counsel cross-examined the investigating officer in regard to Martinez's wife being allowed into the residence while a search warrant was being executed and the following colloquy occurred:

Counsel:	. . . Did you do that [frisk] to Goldie Martinez when she came in the house?
Officer:	No.
Counsel:	Do I have a reputation for being a drug user?
Officer:	To be honest with you, I have heard that.
Counsel:	That I am a drug user?
Officer:	I have.
Counsel:	You have, okay. Methamphetamine?
Officer:	I didn't find anything.
Counsel:	You didn't find anything when you did the search?
Officer:	I am talking about on you.
Counsel:	People who are drug users tend to be thin and drawn-out; right?
Officer:	Well, that's a side effect. That's not a guarantee.
Counsel:	Do I look like a drug user?
Officer:	Well, marijuana makes people eat.
Counsel:	I like to eat.

[1] Martinez contends that *Yakovac* is inconsistent with prior law and should be overruled or disregarded. We decline to do so.

Defense counsel subsequently attempted to make light of the dialogue and then the trial proceeded to the conclusion of the evidence. On the last day of trial, just before the defense rested its case, the court received a note from Juror 351 which said:

> Last Friday during the last time in the jury room I overhead one of the jurors say, "My sister told me he really does take drugs." This was in reference to the defense attorney. I do not feel that this was appropriate.
>
> I do not know his name nor number, but he sits to my right in the jury box.
>
> I also feel the reputation or character of any court official should [sic][2] have any bearing on our consideration.

The trial court questioned Juror 351 in regard to the incident. Juror 440 was identified as having made the comment. Thereafter, the parties stipulated to two measures to address the insertion of defense counsel's alleged reputation as a drug user into the trial. First, the prosecutor made the following statement before the jury:

> Judge, when Detective Shepard came up to testify, Mr. Prior asked the detective a question and basically it was about himself. We need to clarify something there, Judge. When Mr. Prior asked the question, everybody in the room knew what he had done, he asked a questions [sic] that he didn't know the answer to. He didn't follow up on the question: Do you believe that information Detective Shepard?
>
> Detective Shepard would have said: No, I don't believe that information.
>
> Judge, I think we need to set the record straight. We have no information that Mr. Prior is a drug user.

Second, rather than randomly selecting an alternate juror following closing arguments, Juror 440 was deemed the alternate and excused from service before jury deliberations.

As noted, Martinez contends that defense counsel should have requested a mistrial due to jury contamination, rather than stipulate to the measures identified above, and the failure to do so constituted ineffective assistance of counsel. Martinez further contends that the district court should have granted him an evidentiary hearing on this issue rather than summarily dismiss the claim.

In criminal cases, motions for mistrial are governed by Idaho Criminal Rule 29.1. A "mistrial may be declared upon motion of the defendant, when there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, which is

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[2] The parties appear to assume that the juror intended to write "should **not** have any bearing," given the context and tone of the note.

prejudicial to the defendant and deprives the defendant of a fair trial." I.C.R. 29.1(a). Our standard for reviewing a district court's denial of a motion for mistrial is well established:

> [T]he question on appeal is not whether the trial judge reasonably exercised his discretion in light of circumstances existing when the mistrial motion was made. Rather, the question must be whether the event which precipitated the motion for mistrial represented reversible error when viewed in the context of the full record. Thus, where a motion for mistrial has been denied in a criminal case, the "abuse of discretion" standard is a misnomer. The standard, more accurately stated, is one of reversible error. Our focus is upon the continuing impact on the trial of the incident that triggered the mistrial motion. The trial judge's refusal to declare a mistrial will be disturbed only if that incident, viewed retrospectively, constituted reversible error.

State v. Urquhart, 105 Idaho 92, 95, 665 P.3d 1102, 1105 (Ct. App. 1983). In order to prevail on a motion for mistrial based on juror misconduct, the defendant must present clear and convincing evidence that juror misconduct occurred and the trial court must be convinced that the misconduct reasonably could have prejudiced the defendant. *Campbell v. State*, 130 Idaho 546, 549, 944 P.2d 143, 146 (Ct. App. 1997). A prima facie showing of ineffective assistance of counsel based upon failure to move for mistrial requires the allegation of facts that, if true, would establish the motion would have been granted if pursued. *Huck v. State*, 124 Idaho 155, 158, 857 P.2d 634, 636 (Ct. App. 1993).

The post-conviction court, at the hearing on summary dismissal, noted that the dialogue between counsel and the officer was, in context, a misguided effort by counsel to break up or deflect the testimony, was taken humorously by the jury and would not warrant consideration of a mistrial. As noted, though, the dialogue likely engendered the comment from Juror 440.

The post-conviction court reviewed with counsel the evidence presented and inquired as to what additional evidence might be presented on the issue of Juror 440's comment. Counsel stated that the only potential evidence would be to bring jurors in and ask them if they heard the statement. The court noted that it was required to assess the probability of success of the motion and that Martinez was required to present evidence of prejudice. The court found that no evidence of prejudice had been presented and that Martinez had failed to demonstrate a genuine issue of material fact that he was somehow prejudiced or that the outcome would have been different.

We agree with the district court that Martinez failed to present evidence demonstrating a genuine issue of material fact that he was somehow prejudiced or that the outcome would have

been different. On appeal, Martinez argues that "the allegation that the person charged with defending Mr. Martinez, was himself a drug user, seems to reinforce the State's allegation that Mr. Martinez was guilty of the charged offenses and that his trial attorney could be representing him based on a past illegal relationship with Mr. Martinez or even that Mr. Martinez could be paying his attorney with illegal drugs." This speculation does not rise to the level of evidence of prejudice. Moreover, post-conviction counsel's acknowledgement that the only possible source of evidence relative to prejudice might come from subpoenaing jurors itself embodies a speculation that some evidence might exist, but nothing to establish its likelihood was presented to the district court to create a genuine issue of fact. The evidence in the record from Juror 351 was that, while she was not sure whether all of the jurors heard Juror 440's remark, she did know that none of the jurors engaged in further discussion about defense counsel's alleged drug use. The record is devoid of evidence that would create a genuine issue of material fact regarding a basis for a mistrial or prejudice to Martinez in the outcome.[3] There is no evidence that Juror 440's remark had any influence on the other jurors. The district court did not error in granting summary dismissal.

III.

CONCLUSION

Martinez failed to demonstrate a genuine issue of material fact requiring an evidentiary hearing. The district court's order granting summary dismissal of Martinez's application for post-conviction relief is affirmed.

Judge GUTIERREZ and Judge MELANSON, **CONCUR.**

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[3] Indeed, the jury acquitted Martinez on one of the charges